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NO. 77-1176

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1977

No. 77-1176

NABISCO, INC., and PEPSI-COLA GENERAL BOTTLERS, INC.,
Appellants,
v.
BERNARD KORZEN, et al.,
Appellees.

APPEAL FROM THE SUPREME COURT OF ILLINOIS

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF OF NORTHWESTERN UNIVERSITY

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Now comes Northwestern University and, pursuant to Rule 42 of the Rules of this Court, moves for an order permitting it to file a brief herein as *amicus curiae*. In support of its motion, Northwestern University respectfully states as follows:

1. Appellants present for review by this Court the question of whether, consistent with Article I, Section 10 of the Constitution of the United States, the State of Illinois may impose a leasehold tax upon lessees of real estate owned by Northwestern University where the burden of such tax will be shifted to Northwestern in violation of a charter tax exemption previously granted Northwestern. This tax undermines Northwestern's Charter and frustrates the purpose intended to be accomplished by the grant of tax exemption. The tax burden ultimately imposed on Northwestern would amount to approximately $1 million annually—a staggering burden for a privately-financed university. Moreover, in the

short run, Northwestern and the lessees would be thrust into disputes over who must bear the burden of such taxes under the terms of many different lease agreements.

2. Because Northwestern is a real party in interest in this case, Northwestern sought the consent of appellants and appellees to file its brief *amicus curiae*. Although appellants indicated their willingness to consent, appellees declined to do so. Thus, Northwestern files this motion for leave to present its views on this question which it believes may not be fully or adequately presented by the parties. Although appellants raise the substantial constitutional question regarding the impairment of the obligation of Northwestern's contract, they have also raised the constitutional question of whether the short run application of the burden of the leasehold tax on Northwestern's lessees might deprive them of equal protection of the laws. The possibility exists, therefore, that appellants might not adequately deal with the issue of the impairment of Northwestern's Charter contract, which is the issue of paramount concern to Northwestern. This possibility is heightened by the fact that Northwestern has for over a hundred years successfully defended its Charter tax exemption from direct attempts by the Cook County tax officials to nullify its provisions. *Northwestern University* v. *People*, 99 U.S. 309 (1878); *In Re Northwestern University*, 206 Ill. 64, 69 N.E. 75 (1903); *Northwestern University* v. *Hanberg*, 237 Ill. 185, 86 N.E. 734 (1908); *People ex rel. County Collector* v. *Northwestern University*, 51 Ill.2d 131, 281 N.E.2d 334 (1972), *cert. den.*, 409 U.S. 852 (1972).

3. Unlike most cases where the interests of *amicus curiae* are often collateral to the issues raised by the parties, here Northwestern is a real party in interest. In this situation, the charter exemption which Northwestern was granted, and which has been repeatedly sustained by decisions of this Court and the Illinois Supreme Court, is at stake. Northwestern is thus the ultimate stakeholder and is, therefore, in the best position to argue to the Court, through a brief as *amicus curiae*, the substantial constitutional question presented.

For these reasons, Northwestern University requests leave to file its brief as *amicus curiae*, at or before the time set for the filing of the brief of the appellants herein.

Respectfully submitted,

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March 10, 1978

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OCTOBER TERM 1977

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APPEAL FROM THE SUPREME COURT OF ILLINOIS

BRIEF OF NORTHWESTERN UNIVERSITY AS AMICUS CURIAE

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SUPREME COURT OF THE UNITED STATES

January Term, 1978

No. 77-1176

NABISCO, INC., and PEPSI-COLA GENERAL BOTTLERS, INC.,

Appellants,

v.

BERNARD KORZEN, et al.,

Appellees.

APPEAL FROM THE SUPREME COURT OF ILLINOIS

BRIEF OF NORTHWESTERN UNIVERSITY AS AMICUS CURIAE

INTEREST OF AMICUS CURIAE

Northwestern University, a private non-profit educational institution of higher learning, was granted by the State of Illinois, in an 1855 amendment to its Charter, an exemption from taxation on real estate owned by the University. The Legislature's purpose in granting the tax exemption was to promote the public interest in fostering the development and maintenance of higher education. To that end, Northwestern has leased real estate owned by the University to commercial lessees, such as appellants herein, applying the monies thus earned to the furtherance of the University's educational purposes.

Over the course of the hundred years that Northwestern has leased real estate for commercial use, the Cook County tax officials, appellees herein, have made repeated efforts to levy taxes

on real estate owned and leased by the University. In each instance, Northwestern's Charter tax exemption was sustained as a valid and binding contract which could not be impaired by subsequent legislation and, as a result, a tax on real estate owned and leased by Northwestern is impermissible. *Northwestern University* v. *People*, 99 U.S. 309 (1878); *In Re Northwestern University*, 206 Ill. 64, 69 N.E. 75 (1903); *Northwestern University* v. *Hanberg*, 237 Ill. 185, 86 N.E. 734 (1908); *People ex rel. County Collector* v. *Northwestern University*, 51 Ill.2d 131, 281 N.E.2d 334 (1972), *cert. den.*, 409 U.S. 852 (1972).

This appeal arises from Cook County's most recent attempt to circumvent the previous decisions of this Court and the Illinois Supreme Court, which hold that Northwestern's Charter contract may not be impaired. Cook County has assessed and seeks to collect a leasehold tax which is not based on the value of the lessees' interest. Rather, the tax officials have taxed Northwestern's lessees based on the value of property which the lessees do *not* own—but which instead is owned by Northwestern.

There is no question that this tax would ultimately and inevitably be borne by Northwestern because when leases are negotiated in the future, the rents which prospective lessees are willing to pay will be reduced. Thus, the net effect would be to impair the Charter contract.

Northwestern University is a real party in interest in these appeals and it is its purpose here to demonstrate that the leasehold tax violates Northwestern's Charter contrary to the Obligations of Contracts Clause of the United States Constitution.

QUESTION PRESENTED

Whether Section 26 of the Illinois Revenue Act of 1939, Ill. Rev. Stat., Ch. 120, §507 (1975), which provides for taxing leaseholds estates "when real estate which is exempt from taxation is leased to another whose property is not exempt," may be applied to tax a lessee for property which belongs not to the lessee but to the lessor, the owner of the fee, when the effect of doing so would be to impair a valid and binding Charter contract tax exemption in violation of Article I, Section 10 of the United States Constitution.

STATEMENT OF THE CASE

The undergraduate campus of Northwestern University is located in Evanston, Illinois. The University also maintains a campus in Chicago, Illinois, where the professional schools of law, medicine, and dentistry, the Evening Divisions, and part of the Graduate School of Management are located.

Northwestern University received its Charter from the State of Illinois in 1851.[1] This Charter provides that the University's Trustees shall hold its property "*solely for the purposes of education*, and not as a stock for the individual benefit of themselves or any contributor to the endowment of the same." (Emphasis supplied; App. 29, Section 2.) It further provides that the University, through its Trustees, shall have the power to lease its real estate:

> "to grant, bargain, sell, convey, devise, let, place out at interest, or otherwise dispose of the same for the use of said institution, in such manner as to them shall seem most beneficial to said institution." (App. 30, Section 4.)

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[1]The Act to Incorporate Northwestern University and the First Amendment thereto (the "Charter"), are attached as Appendix 6, pp. 28-33 of Appellants' Jurisdictional Statement. Throughout this Brief, references to the Charter provisions in Appendix 6 are cited as "App. _____, Section _____."

The proceeds of such sales and leases, like other assets of the University, are to be devoted solely to its enumerated educational purposes:

> "Said corporation shall faithfully apply all the funds collected, or the proceeds of the property belonging to said institution, according to their best judgment, in erecting and completing suitable buildings, supporting necessary officers, instructors, and servants, and procuring books, maps, charts, globes, and philosophical, chemical, and other apparatus necessary to the success of the institution, and do all other acts usually performed by similar institutions that may be deemed necessary or useful to the success of said institution under the restrictions herein imposed." (*Id.*)

The Charter also provides that Northwestern "shall not be allowed to hold more than two thousand acres of land at any one time, unless the said corporation shall have received the same by gift, grant, or devise," with an additional provision that in the event gifts result in total land holdings of over two thousand acres the University is required to sell the excess within ten years. (*Id.*)

The Charter was amended by the Legislature in 1855 by an act which provided, among other things, "That all property, of whatever kind or description, belonging to or owned by said corporation, shall be forever free from taxation for any and all purposes." (App. 33, Section 4.) Later in that same year, the University opened and enrolled its first students.

Unlike a number of institutions of higher learning in Illinois, including schools (such as the University of Illinois) which are supported directly out of tax revenues, Northwestern University's operating revenues have been generated through private gifts of land and other private gifts, in addition to tuition. The reasons for this are historical. Northwestern's Charter was granted pursuant to Article 9, Section 3 of the Illinois Constitution of 1848, which provides that:

> "The property of the state and counties, both real and personal, and such other property as the general assembly may deem necessary for school, religious and charitable purposes, may be exempted from taxation."

In 1848, Illinois was an economically undeveloped State, with a large debt and insufficient means with which directly to establish educational institutions requiring continuing sources of revenue to support professors and maintain the institutions. The State met this problem by incorporating a number of private schools, which were authorized to own property, lease it, and use the proceeds to support their educational programs. An integral part of this approach was the permanent exemption from taxation accorded those schools, which served the same function as an endowment of property producing annual revenues. At every session of the State Legislature between 1848 and 1870, charters were enacted creating educational institutions throughout the State with full exemption from taxation for property held by them.

In 1870 a new State Constitution was adopted. This Constitution contained a new provision for exemption of educational and charitable institutions from taxation, limiting the Legislature's power to grant tax exemptions for colleges and universities to property which was itself used exclusively for school purposes (Ill. Rev. Stat., p. 75, Art. 9, §3 (1874)):

> "The property of the state, counties and other municipal corporations, both real and personal, and such other property as may be used exclusively for agricultural and horticultural societies, for school, religious, cemetery and charitable purposes, may be exempted from taxation; but such exemption shall be only by general law."[2]

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[2]At the next session of the Legislature, acting pursuant to the new Constitution, the Legislature adopted a new revenue law providing for such limited tax exemption, applicable to (Ill. Rev. Stat., p. 857, Ch. 120, §2 (1882)):

> "All property of institutions of learning, including the real estate on which the institutions are located, not leased by such institutions or otherwise used with a view to profit."

Thereafter, Cook County levied taxes on certain properties owned and leased by Northwestern, and Northwestern objected to the taxes on the ground that its property was exempt from taxation under its Charter. The case reached this Court, which held that the Charter was a valid and binding contract, and that the tax exemption provided by the Charter could not be impaired by subsequent legislation. *Northwestern University* v. *People*, 99 U.S. 309 (1878).

In 1903, Cook County challenged the Charter exemption with respect to property acquired prior to the 1855 exemption. The Illinois Supreme Court, *In Re Northwestern University*, 206 Ill. 64, 69 N.E. 75 (1903), held that the language of the Charter exemption—"all property, of whatever kind or description, belonging to or owned by said corporation,"—applied to property acquired prior to 1855. Again, in 1905, Cook County attacked the exemption, this time with respect to property acquired after 1855. The Illinois Supreme Court, in *Northwestern University* v. *Hanberg*, 237 Ill. 185, 86 N.E. 734 (1908), held that the exemption applied to property acquired after, as well as before, 1855.

In 1970, Cook County again sought to tax real estate owned by Northwestern, this time on the theory that the Charter exemption was an unconstitutional discrimination against educational institutions founded after 1870 which did not receive Charter exemptions. The Illinois Supreme Court, in *People ex rel. County Collector* v. *Northwestern University*, 51 Ill.2d 131, 281, N.E.2d 334, *cert. den.*, 409 U.S. 852 (1972), unanimously rejected this attack on Northwestern's Charter. The Court recognized that the granting of such tax exemptions "was not at all unusual" in the 1850's, and that the legislature's purpose in granting an exemption to Northwestern was to induce donations to the institution and thus to promote the public interest in fostering higher education (51 Ill.2d at 134, 281 N.E.2d at 335):

> "[A]s of the date when the tax exemption was enacted as a means of inducing donations to the institution, the tax exemption was not at all unusual. The public interest in higher education was recognized in the early days of the State, but at that time the recognition took the form of special charters authorizing the incorporation of particular educational institutions. The Charters contained tax exemptions, the terms of which varied, apparently in accordance with the inducement thought necessary to bring about contributions to establish and maintain the institutions."

As a result of these four decisions, Northwestern has remained exempt from taxes on its real estate properties.

Although Northwestern was originally authorized to own up to 2,000 acres of land, and although the Legislature in 1855 expressly authorized Northwestern to lease its land and clearly contemplated that much of Northwestern's land would be leased or otherwise used for the purpose of producing revenues for the continuing support of Northwestern's educational program, the University's land holdings have never approached the ceiling of 2,000 acres. Northwestern, in the early years of its history, owned approximately 680 acres of land in Cook County. It owns only about 430 acres today, of which only about 70 acres are leased to provide revenues for educational purposes.

Three of the properties owned by Northwestern are leased to appellants herein, Nabisco, Inc. and Pepsi-Cola General Bottlers, Inc., and it is the Cook County tax officials' assessment and attempt to collect one year's leasehold taxes on these properties for the tax years 1973 (as to Pepsi-Cola) and 1974 (as to Nabisco) that gives rise to the instant appeals. Instead of taxing the leaseholds on what those leaseholds are actually worth, Cook County used as the assessed valuations the amounts attributed to the values of the *improvements* on the properties. But *these improvements belong to the lessor, Northwestern*—not to the lessee.

As a result of Cook County's application of the Section 26 leasehold tax, the lessees would be made to bear leasehold taxes on

property which does not belong to the lessees, but to Northwestern. To the extent the lessees would be taxed on this excess value, attributable to Northwestern's property rather than their own, the lessees would be that much less willing and able to pay rent to the lessor, Northwestern. Thus, when rental agreements are negotiated, Northwestern would inevitably—as a matter of market necessity—have to bear the entire amount of this tax burden, either by agreeing to pay the lessee's tax or by agreeing to accept less rent. Either way, the burden of the tax would fall on Northwestern.

It is estimated that if Cook County's unconstitutional application of Section 26 is not prevented, Northwestern would ultimately bear a tax burden of approximately $1 million annually. The magnitude of this adverse impact on the University's finances may be perceived from the fact that this amount is approximately equivalent to two-thirds of Northwestern's current annual budget for library books. It is also approximately equivalent to one-tenth of the amount granted annually by the University in student scholarships. Moreover, the impact of this tax would have placed the University in a deficit position for fiscal periods 1973-74 and 1974-75.[3]

ARGUMENT

The Illinois Supreme Court's opinion from which these appeals arise, *Nabisco, Inc.* v. *Korzen*, 68 Ill.2d 441, 369 N.E.2d 829 (1977), holds that under *Jetton* v. *University of The South*, 208 U.S. 489 (1908), and other cases, Northwestern University's Charter tax exemption does not preclude the taxing of the lease-

[3]The amounts expended by Northwestern University for library books during the school years 1973-1974, 1974-1975 were respectively $1,555,168 and $1,300,782. The expenditures for student scholarships for the years 1973-1974 and 1974-1975 were respectively $10,744,677 and $9,135,807. The University's surplus for the fiscal periods 1973-1974, 1974-75 was respectively $598,135 and $354,397.

hold estates of lessees of Northwestern under Section 26 of the Illinois Revenue Act. The Illinois Supreme Court, as well as Cook County,[4] concedes however that (68 Ill.2d at 457; 369 N.E.2d at 831):

> "Northwestern's tax exemption constitutes a contract between the State and the University which cannot be impaired by subsequent legislation imposing taxes upon its property whether that property be directly used for school purposes or leased to others and the proceeds used for school purposes."

As the dissenting judges observed, the majority opinion of the Illinois Supreme Court ignores that, under the facts of this case, the effect of the application of Section 26 will be to nullify Northwestern's Charter by depriving the University of funds intended to further its educational purposes (68 Ill.2d at 467; 369 N.E.2d at 836):

> "In discussing the effect of the taxes here in question defendants [Cook County tax officials] concede that sustaining the tax will result in a reduction in Northwestern's income from its leased property by compelling the university, depending on the interpretation of its lease clauses, to reimburse its lessees for taxes paid, forgo its right to the additional rent it now receives in lieu of taxes, or accept a lower rental when its leases must be renegotiated. The allegations by plaintiffs and Northwestern that these immediate or ultimate losses of income resulting from imposition of the tax will exceed $1,000,000 are not contradicted."

What is at issue in this case is not the proper valuation methods for taxing a leasehold estate. What is at issue here is the imposition of the leasehold tax which, under the facts of this case, will deprive Northwestern of the benefits of its Charter contract. As

[4]Brief and Argument for Defendant-Appellants, Cook County tax officials, submitted to the Illinois Supreme Court, Appeal No. 48251, p. 19.

the dissenting judges observed (68 Ill.2d at 468–69; 369 N.E.2d at 837):

> "Northwestern's lease with Pepsi-Cola expressly requires payment by the lessee of 'tax-lieu rent'—an amount, agreed upon by the parties at four-year intervals, representing the approximate amount which would be payable in taxes were the property not exempt. For 1974 the amount of 'tax-lieu rent' claimed by Northwestern was $87,150. The tax bill received by Pepsi in August of that year, for 1973 taxes, was $83,498.10. *Quite clearly demonstrated is the fact that taxation of this leasehold interest is, for all practical purposes, the equivalent of taxing Northwestern upon its exempt fee interest, thus, as to this leased property, effectively nullifying its exemption.* The university will no longer receive 'tax-lieu rent' from Pepsi-Cola, and Nabisco will deduct its taxes from rental payments. This subversion of Northwestern's exemption is, in [our] judgment, a clear impairment of its charter contract in violation of section 10 of article I of the Constitution of the United States." (Emphasis added).

Here Cook County has not sought to tax Northwestern's lessees on what they own. Instead, Cook County has sought to tax the lessees *on what they do not own*—but on what Northwestern owns. Thus, it is trying to make the lessee pay a tax—not on its leasehold—but on the property owned by the lessor, the University. It is uncontroverted that the effect of applying Section 26 in this manner would inevitably be to shift this tax burden (attributable to property owned by Northwestern) from the lessee to the lessor—either directly, if the lease terms so provide, or indirectly, by an eventual reduction in rent the lessee would be able or willing to pay. In either event, such an application of Section 26 would deprive the University of a benefit which it was the purpose of the Charter to protect, and would thus result in the loss of revenues which the Legislature intended would be used by the University to promote the purposes for which it was chartered—i.e., higher education.

I. NORTHWESTERN UNIVERSITY'S PROPERTY, INCLUDING ITS FEE INTEREST IN THE PROPERTIES LEASED TO NABISCO AND PEPSI-COLA, MAY NOT BE TAXED

The uncontroverted legal premise which constitutes the starting point for analysis in these appeals is that Northwestern's fee interest in the properties leased to appellants is exempt from taxation by its Charter and under the Obligation of Contracts Clause of the United States Constitution. This premise is so plainly established by the previous decisions of this Court and of the Illinois Supreme Court, in *Northwestern University* v. *People*, 99 U.S. 309 (1878), *In Re Northwestern University*, 206 Ill. 64 (1903); *Northwestern University* v. *Hanberg*, 237 Ill. 185 (1908), and *People ex rel. County Collector* v. *Northwestern University*, 51 Ill.2d 131 (1972), *cert. den.*, 409 U.S. 852 (1972), that it is not controverted by Cook County or the opinion of the Illinois Supreme Court.

The Legislature's purpose in granting Northwestern its Charter exemption from taxation is likewise not subject to dispute. At the time the Charter was granted, which was prior to the establishment of land grant colleges and universities and the direct funding of state-administered universities,[5] the only way the State of Illinois had to foster and encourage higher education was to charter colleges and universities, to authorize them to own real es-

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[5]Northwestern's Charter was granted in 1851. Following 1862, with the aid of land grants provided by Congress to the States for the endowment of colleges to teach agriculture and the mechanic arts (Act of July 2, 1862, 12 Stat. 503; 7 U.S.C. §§301 et seq.), the State of Illinois became financially able to provide direct revenue support to higher education. The first appropriation from funds raised by general taxes in support of the Illinois Industrial University, the forerunner of the present University of Illinois, was made in 1869, and increased appropriations followed in succeeding years. See *Illinois Industrial University* v. *Board of Supervisors*, 76 Ill. 184 (1875).

tate and to use it or lease it to provide rental income to support the educational program, and to grant exemptions from property tax.

Accordingly, Northwestern's Charter expressly authorized the University to own and lease real estate:

> "to grant, bargain, sell, convey, *devise, let, place out at interest, or otherwise dispose of* said institution, in such manner *as to them* [the Trustees] *shall seem most beneficial to said institution.*" (App. 30, Section 4; emphasis supplied.)

The proceeds of any leases or sales, like other assets of the University, are to be used solely for its educational purposes. (*Id.*)

The Charter further provided that the University "shall not be allowed to hold more than two thousand acres of land at any one time, unless the said corporation shall have received the same by gift, grant, or devise. . . . " This provision confirms, if confirmation were necessary, that the Legislature expected and intended that Northwestern would rent or otherwise use its properties to raise money to support its educational program. The University could not conceivably have used 2,000 acres entirely for educational facilities. Northwestern's campus at Evanston today comprises only 225 acres, of which 70 acres were added within the last decade as a result of a land-fill in Lake Michigan.

The exemption from property tax granted to Northwestern with respect to its property extended to "all property, of whatever kind or description, belonging to or owned by said corporation. . . ." Such property, including leased property, was declared to be "forever free from taxation for any and all purposes." (App. 33, Section 4). The Illinois Supreme Court in *People ex rel. County Collector* v. *Northwestern University*, 51 Ill.2d 131, 281 N.E.2d 334 (1972), *cert. den.*, 409 U.S. 852 (1972), expressly recognized that the Legislature's purpose in granting this exemption from taxation was to support higher education by inducing contributions to the University—the proceeds of such contributions to be free from taxation (*id.*, at 134; *id.*, at 337); and it unanimously ruled that this purpose, and the exemption which proceeded from it, were fully applicable to property leased to provide revenues to be used for education—there the Dee-El Garage property, a parking garage leased to a commercial tenant, which paid rents to the University. The reasoning and holding of the Illinois Supreme Court in the *Dee-El* case are fully applicable to the properties leased to appellants.

II. THE STATE OF ILLINOIS HAS CIRCUMVENTED THE PROTECTIONS OF THE CHARTER AND THE HOLDINGS OF THIS COURT BY LEVYING A TAX ON NORTHWESTERN'S LESSEES BASED ON PROPERTY ACTUALLY OWNED BY NORTHWESTERN, WHICH WILL UTIMATELY BE BORNE BY NORTHWESTERN, THEREBY CONTRAVENING THE OBLIGATION OF CONTRACTS CLAUSE OF THE UNITED STATES CONSTITUTION.

Because the State may not tax Northwestern on property it owns, the issue is whether the State may tax Northwestern's lessees on what Northwestern owns—if the inevitable result is exactly the same as if Northwestern's property were taxed.

The consequence of such a tax on the lessee would obviously be the same as taxing Northwestern's property directly, since no lessee would agree to rent the property from Northwestern in such circumstances unless Northwestern either paid the leasehold tax or reduced the rent otherwise payable by the amount of the tax. The effect, in either event, would be to place the tax burden on Northwestern because of property it owns.

If this consequence were permitted, then the Charter exemption would be rendered a nullity with respect to properties leased by the University to provide revenues for education; and the Legislature's purpose in creating the Charter exemption and

making it applicable to properties leased to provide educational revenues, which this Court has recognized and enforced, would be completely undermined.

Because any case involving Charter exemptions from taxation turns on the nature and purpose of the particular provisions in question, cases involving charters different from Northwestern's —where the legislative purpose in granting the exemption may be different, or less clear, than the purpose of the Illinois General Assembly in granting Northwestern its Charter—are not controlling.

Two cases closely in point are *Wright* v. *Central of Georgia Ry.*, 236 U.S. 674 (1915), and *Central of Georgia Ry. Co.* v. *Wright*, 248 U.S. 525 (1919). Two railroads, the Augusta and Savannah Railroad and the Southwestern Railroad, were granted charters by the State of Georgia containing provisions exempting property which they owned from taxation (subject to deductions not here relevant). These two railroads leased their properties to a lessee, which later went into receivership and after reorganization passed to the Central of Georgia Railway Company. The State first sought to collect *ad valorem* taxes on the underlying properties from the lessee. (236 U.S. at 676.) The Court in *Wright* v. *Central of Georgia Ry.*, 236 U.S. 674 (1915), in an opinion by Mr. Justice Holmes, reasoned that jurisdiction to execute for the taxes depended on whether the properties sought to be taxed were properties belonging to the lessee, the plaintiff: "If they are not, the attempt is an attempt to tax the plaintiff upon property that it does not own." (236 U.S. at 677–678.) The Court, after examining the transactions and the purported tax, held that the two lessor railroads had been authorized by their charters to enter into the lease arrangements, and that such leases did not result in a loss of the exemption for the underlying fee interest of those two railroads. Moreover, because the fee was exempt from taxation to the lessors, it was likewise exempt so far as the lessee was concerned. "We cannot suppose that the Legislature meant either to practice a cunning deception or to make a futile grant. Therefore, we are unable to read the charter as making the exemption vain by reserving to the State an unlimited right to impose upon the lessee all that it had renounced as against the lessor" (236 U.S. at 679). This Court thus expressly ruled that the lessee could not be taxed on the exempt fee—"the protection of the lessee being necessary in order to make good that promised to the lessor." (*Id.*, at 680).

In this first *Central of Georgia* case, the State had attempted "to tax the fee as the property of the plaintiff" (*id.*, at 681), *i.e.*, the lessee, and this attempt was invalidated. Thereafter, the State sought to circumvent the effect of this ruling by levying the taxes upon the leasehold interest of the lessee, rather than the fee. In the second *Central of Georgia* case, *Central of Georgia Ry. Co.* v. *Wright*, 248 U.S. 525 (1919), this Court, in a second opinion by Mr. Justice Holmes, invalidated the purported tax on the leasehold, holding that "the reasoning [in the first case] applies with equal force to that now before us."

The reasoning and holding of these two cases are fully applicable here. The lessees, here appellants, cannot be taxed on property which belongs to the owner, Northwestern, since it should not be supposed the Illinois General Assembly in 1855 practiced "a cunning deception" or made "a futile grant" to Northwestern; and the Charter exemption should not be rendered "vain by reserving to the State an unlimited right to impose upon the lessee all that it had renounced as against the lessor" (236 U.S. at 679). And, even more to the point, since the lessees cannot be directly taxed on the value of the fee owned by Northwestern, this "reasoning applied with equal force" to preclude a purported leasehold tax which would have the same effect (248 U.S. at 527).

This Court's second *Central of Georgia* decision is of special significance in this appeal because the Court there distinguished

Jetton v. *University of the South*, 208 U.S. 489 (1908)—the case primarily relied upon below—as not controlling (248 U.S. at 527). In *Jetton* the question had been whether the lessee could be taxed on what the lessee owned, and the Court had answered in the affirmative. In the *Central of Georgia* cases, by contrast, the question was whether the lessee could be taxed on what the lessor—the chartered entity—owned, and the Court held that it could *not* be so taxed, either directly or in the form of a purported leasehold tax.

In the instant action, the Illinois Supreme Court made no effort to square its decision with the *Central of Georgia* cases, relying instead on the holding of *Jetton* v. *University of the South* (68 Ill.2d at 458–461, 369 N.E.2d at 836–39). This was clearly erroneous not only because *Jetton* is distinguishable from the facts of the instant case, but because *Jetton* was not regarded as controlling in the later-decided *Central of Georgia* cases. Moreover, the majority opinion below completely fails to address the issue of whether the leasehold tax as assessed under the facts here places a tax burden on Northwestern in violation of the University's Charter. Indeed, with respect to arguments raised by Northwestern that the tax as assessed was contrary to the Charter and unconstitutional, the majority inexplicably asserted that in view of "the conclusions reached, we need not further consider [Northwestern's] arguments," (68 Ill.2d at 462; 369 N.E.2d at 840), and did not respond at all to the opinion of the dissenting judges who agreed with Northwestern that:

> "Considering the fact that the leasehold tax, as assessed, closely parallels the amount of general real estate taxes collectible on non-exempt property, the practical result is to shift to Northwestern the burden of the tax . . . . Likewise, the inevitable and significant reduction in rental income impairs Northwestern's Charter contract in what [we] believe to be a violation of Section 10 of Article I of the Constitution of the United States.

> As Mr. Justice Holmes wrote in the first *Central of Georgia* case, 'the protection of the lessee being necessary in order to make good that promised to the lessor' . . . , [we] would hold that the Section 26 leasehold tax, as this court has held it must be computed, cannot be imposed upon the plaintiffs herein." (68 Ill.2d at 471–72; 369 N.E.2d at 849–50).

If the decision below is not reversed, the benefit of the Charter exemption which has withstood numerous direct challenges in previous decisions of this Court and the Illinois Supreme Court will be rendered a nullity through the indirect device of a leasehold tax on property owned by Northwestern—not its lessees. The decision below of the Illinois Supreme Court has effectively rendered the Charter exemption meaningless as to commercially based properties, reducing it, in the words of Mr. Justice Holmes in *Central of Georgia*, to no more than a "cunning deception" or "a futile grant." In this situation, the Charter provisions will have been undermined, and the purpose of the Charter of facilitating the development and maintenance of quality private education will have been defeated.

CONCLUSION

For the foregoing reasons, the judgment of the Supreme Court of Illinois should be reversed because the leasehold tax as assessed and sought to be collected here is an unconstitutional impairment of the obligations of Northwestern's Charter contract.

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